

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

STEPHEN J. OBERTO, et al.,

Plaintiffs,

v.

PLATYPUS MARINE, INC.,

Defendant.

CASE NO. C16-5320RBL

ORDER ON PLAINTIFF'S MOTION
FOR SUMMARY JUDGMENT

THIS MATTER is before the Court on Plaintiff Oberto's Motion for Partial Summary Judgment [Dkt. #]. In early 2014, Oberto¹ hired Defendant Platypus Marine to paint² his 1998, 68 foot LeClerq yacht, "Maximo." The existing coating was unknown, but was in poor condition. Platypus claims it told Oberto that in order to give Maximo a "perfect" glossy finish, all of the existing paint would have to be removed, which would cost an additional \$200,000. Instead, Platypus and Oberto agreed that Maximo would get a "commercial," rather than a "show," finish, in which the new, two part paint—Awlgrip—would be painted over the existing coating(s).

¹ Stephen and Kim Oberto, husband and wife, are the plaintiffs. This Order will use the singular for ease of reference. No disrespect is intended.

² Other work was commissioned and apparently completed without controversy.

1 Platypus's bid included the promise that "all coatings will be applied according to
2 Manufacturer's specifications and procedures." Awlgrip's manufacturer is AkzoNobel.

3 In April, 2014 Platypus informed Oberto that the yacht was finished but that there were
4 "issues" with the paint: cosmetic defects appeared below, and "bled," or telegraphed, through the
5 topcoat.

6 Platypus claims that it applied the Awlgrip consistent with the manufacturer's
7 specifications, including applying a coating (a primer) containing T0006 solvent—which it
8 claims confirmed that the Awlgrip was compatible with the underlying, unknown topcoat(s).

9 When the paint issues were arose, Platypus contacted Ray Tucker at AkzoNobel to
10 discuss their cause, and the remedy. Tucker did his own test, using not T0006 solvent but MEK,
11 which Platypus claims is not the approved manufacturer's method for determining Awlgrip's
12 compatibility³ with unknown substrate coatings. Tucker found that the paints were not
13 compatible.

14 Oberto claims that Platypus did *not* do the compatibility test that AkzoNobel required.

15 In any event, the parties agreed that the boat would have to be re-painted, and that Oberto
16 could withhold \$25,000 of the contract price and take the yacht so he could use it that summer.
17 That agreement was memorialized in a letter.

18 Maximo was returned to Platypus in October 2014, and a dispute arose about what went
19 wrong and how it should be remedied. Platypus proposed "scuffing and shooting" the hull with
20 Awlgrip again. Oberto was not convinced that this was the appropriate remedy given the prior
21 compatibility issues, and demanded that Platypus take core samples and have them analyzed at
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23 ³ Like most "two part" or "two pack" high end coatings, Awlgrip is not compatible with existing, lesser quality, one
24 part coatings. It will apparently melt them.

1 AkzoNobel. Those samples were taken and analyzed, and Oberto claims they confirmed that at
2 least one of the existing coatings was not compatible with Awlgrip. He also claims that
3 AkzoNobel criticized Platypus for not confirming the compatibility prior to painting the first
4 time. AkzoNobel would not warranty the Awlgrip coating if the underlying coating was not
5 removed prior to re-painting; the two part Awlgrip is not compatible with the one part underlying
6 paint.

7 The parties could not agree on a path forward, and in 2016 Oberto sued. He asserts claims
8 for breach of contract and breach of warranty, seeking damages and attorneys' fees. Oberto now
9 seeks partial summary judgment on his contract and warranty claims, arguing that Platypus
10 breached its agreement to apply the Awlgrip in accordance with AkzoNobel's specifications—
11 specifically, it did not ensure compatibility prior to painting the hull. He apparently seeks the
12 cost of removing the new paint and the old paint, and re-painting with Awlgrip—essentially the
13 “show” paint job that he declined to commission in 2014.

14 Platypus claims that it agreed in April 2014 only to “scuff and shoot” the then-existing
15 coating—including the new, defective, Awlgrip—on portions of the hull, at its cost, which it
16 claims is the commercially reasonable remedy. It claims AkzoNobel agrees.

17 Platypus also claims that the bulk of the 2014 paint issues have since resolved, and that
18 the remaining issues are related not to the paint job but to the fact that a darker hull gets warmer
19 than a light one, and that Maximo has suffered from “post cure print through”—the fiberglass
20 and resin structure of the hull continued to cure when it got warmer, and the fiberglass is visible
21 under the Awlgrip.

22 Platypus argues that Oberto is not entitled to a finding as a matter of law that the remedy
23 it proposes is unreasonable as a matter of law, and argues that Oberto essentially seeks a
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1 windfall. Finally, Platypus offers expert testimony that while there are cosmetic issues with the
2 paint finish, the Awlgrip paint is *not* incompatible with the underlying, existing coatings. It
3 argues there are material issues of fact surrounding the entire controversy that preclude even
4 partial summary judgment.

5 **Summary Judgment Standard**

6 Summary judgment is proper “if the pleadings, the discovery and disclosure materials on
7 file, and any affidavits show that there is no genuine issue as to any material fact and that the
8 movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c). In determining whether
9 an issue of fact exists, the Court must view all evidence in the light most favorable to the
10 nonmoving party and draw all reasonable inferences in that party’s favor. *Anderson Liberty*
11 *Lobby, Inc.*, 477 U.S. 242, 248-50 (1986); *Bagdadi v. Nazar*, 84 F.3d 1194, 1197 (9th Cir. 1996).

12 A genuine issue of material fact exists where there is sufficient evidence for a reasonable
13 factfinder to find for the nonmoving party. *Anderson*, 477 U.S. at 248. The inquiry is “whether
14 the evidence presents a sufficient disagreement to require submission to a jury or whether it is so
15 one-sided that one party must prevail as a matter of law.” *Id.* at 251-52. The moving party bears
16 the initial burden of showing that there is no evidence which supports an element essential to the
17 nonmovant’s claim. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Once the movant has
18 met this burden, the nonmoving party then must show that there is a genuine issue for trial.
19 *Anderson*, 477 U.S. at 250. If the nonmoving party fails to establish the existence of a genuine
20 issue of material fact, “the moving party is entitled to judgment as a matter of law.” *Celotex*, 477
21 U.S. at 323-24.

22 Oberto’s breach of contract and breach of warranty claims both depend on his claim that
23 Platypus agreed to apply the Awlgrip “according to AkzoNobel’s specifications and procedures”
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1 and it failed to do so. He claims that there is no factual dispute that Platypus failed to perform
2 Awgrip's required compatibility tests, and that Platypus's claim that the primer it used included
3 T0006 solvent is not sufficient to satisfy its agreement to test according to Awgrip's more
4 stringent procedures.

5 But Platypus⁴ argues, and it provides evidence, that (1) the Awlgrip *was* compatible with
6 the outermost underlying coating; (2) that its painting procedure *did* ensure that fact; and (3) that
7 the problems with the coating have resolved, except for the unrelated post cure print through.
8 Absurd or not, this court cannot adjudicate credibility issues on summary judgment.

9 Oberto is similarly not entitled to summary judgment on his claim that Platypus "agreed
10 to re-paint" Maximo after it released the yacht in April 2014. There is obviously a material issue
11 of fact about whether (as Platypus claims) it was to "scuff and shoot"—to re-paint the hull, as it
12 agreed to do initially—or whether (as Oberto seems to claim) it agreed to remove all of the new
13 and old coatings and re-paint the hull in a manner that Oberto specifically declined to pay for in
14 the beginning. Even if Platypus had done exactly what Oberto claims it should have, and
15 discovered that the existing paint was not compatible with Awlgrip, it had not agreed to and
16 would not have been obligated to remove all of the old paint from the yacht for the price of the
17 "scuff and shoot" bid.

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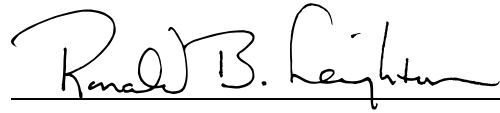
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23 ⁴ Platypus also argues, persuasively, that the remedy for a less-than-satisfactory commercial paint finish is not to
24 apply the show finish for which the customer explicitly declined to pay. While this may be a "damages" argument, a
technical breach of a duty that does not proximately cause damage is not actionable.

1 This is an unfortunate situation, perhaps made worse by the passage of time and the
2 parties' intransigence. From the Court's perspective, it is not one that warrants a jury trial. But
3 the dispute is not one that the Court can resolve as a matter of law. In any event, Oberto's
4 Motion for Partial Summary is DENIED.

5 IT IS SO ORDERED.

6 Dated this 31st day of August, 2017.

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Ronald B. Leighton
United States District Judge